No. 2423.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHWESTERN LUMBER COMPANY,
Appellant,
vs.
GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY, OREGON & WASHINGTON RAILROAD COMPANY, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, and CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY,
Appellees.

No. 2423.

Upon Appeal from the United States District Court
for the Western District of Washington
Southern Division

## BRIEF FOR APPELLEES

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
*Solicitors for Appellees.*

THE IVY PRESS, THIRD AND CHERRY, SEATTLE

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NORTHWESTERN LUMBER COMPANY, a corporation, Appellant,

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## BRIEF FOR APPELLEES

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### STATEMENT

The appellant, complainant below, brought this action against the appellees for specific performance of an alleged contract for the sale of certain real estate by appellant to Grays Harbor & Puget Sound Railway Company. The complainant owned a large body of land in the city of Hoquiam. Grays Harbor

& Puget Sound Railway Company was constructing a railroad from a point near Centralia, in the state of Washington, through the city of Aberdeen and into Hoquiam. That company found that it was impracticable to acquire a right of way for a railroad from Aberdeen across the river into Hoquiam without crossing some of the lands owned by complainant. In the summer of 1908 the Railroad Company, acting through Mr. H. F. Baldwin, its then chief engineer, opened negotiations with complainant for a right of way over its lands. All negotiations, while conducted directly by the chief engineer of the Railroad Company, were subject to the approval of Mr. J. D. Farrell, the vice-president of the O. & W. R. R. Co., which fact was clearly understood by all parties. (Transcript pp. 158, 92.) On September 25, 1908, complainant submitted to Mr. Baldwin a proposal to sell to the Railroad Company the right of way for its road along either of four alternative routes called "Railroad Avenue Line," "River Avenue Line," "Simpson Avenue Line," and "Emerson's Proposition." This proposal from complainant is found on pages 5 and 6 of the Transcript. The Railroad Company desired the line designated as the "Emerson Proposition" and, through its attorney at Aberdeen, Mr. J. B. Bridges, endeavored to induce complainant to

reduce the price named in its written proposition, to-wit: $134,000 (Transcript, pp. 142, 143); but complainant refused to make any abatement in the price. On June 9, 1909, Mr. Baldwin and Mr. Bridges, representing the Railroad Company, met with Mr. C. H. Jones and Mr. George H. Emerson, the president and vice-president of the Lumber Company, and reached a tentative agreement, which was reduced to writing and executed by the parties, and which is as follows:

"June 9th, 1909.

Northwestern Lumber Company,
Hoquiam, Wash.

Gentlemen:

We beg to advise you that we accept what is called (6) the 'Emerson' proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for One Hundred and Thirty-four Thousand ($134,000) Dollars.

We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers.

However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam.

You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of proper deeds of warranty to such property, we will pay you the aforesaid

sum. All buildings to be removed by you within six months from date of deed.

THE GRAYS HARBOR & PUGET SOUND RY. CO.
By H. F. Baldwin.

We accept the foregoing proposition.
THE NORTHWESTERN LUMBER COMPANY.
By C. H. Jones,
Prest."

Abstracts of title were subsequently furnished by complainant to Mr. Bridges, and the title was found to be substantially satisfactory. Mr. H. F. Baldwin died on June 16th, 1909, and Mr. J. R. Holman succeeded him as chief engineer of the Railway Company, taking charge of the office early in July. In the meantime, Mr. Bridges, on behalf of the Railroad Company, and Mr. Emerson, on behalf of the Lumber Company, met in Mr. Emerson's office during the latter part of June, 1909, for the purpose of drafting the formal agreement called for by the second clause of the letter and acceptance of June 9th. This agreement was dictated by Mr. Bridges, in the presence of Mr. Emerson and with Mr. Emerson's assistance, to Mr. Emerson's stenographer, who was to transcribe it and furnish Mr. Bridges with a copy to be sent to the officers of the Railway Company for approval or disapproval. (Transcript, pp. 92 and 143.) After this agreement as dictated by Mr. Bridges and Mr. Emerson was transcribed, no copy was sent to Mr. Bridges.

The exact order of the negotiations between the parties following the preparation of this draft of the proposed formal agreement by Mr. Bridges and Mr. Emerson, is involved in some contradiction, but all parties are agreed that Mr. Jones, on behalf of the complainant Company, refused to accept the agreement as drawn by Bridges and Emerson, and he and Emerson made a new draft containing certain material additions and changes. The Bridges draft provided for payment of the purchase price upon the execution and delivery of deeds of conveyance in accordance with the terms of the letter of June 9th. The draft prepared and signed by Jones provided for a payment of $20,000 cash upon the execution of the agreement, and the remainder of the purchase price upon the execution of the deed. Jones also added a clause, number 8, reading as follows:

> "8th. It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson Avenue shall be so arranged as to interfere with the handling of logs in their mill pond the least possible and with that object in view that an ample span shall be placed west of the west pier of the draw-bridge and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge and in accordance with the requirements of the U. S. Government, about thirty feet into the river from the line of the piles of the first party's pond,

> as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the city of Hoquiam, provided the city of Hoquiam contributes its share of cost of construction and maintenance." (Transcript, p. 17.)

This so-called Jones draft was executed by complainant and forwarded direct to the Railroad Company's office in Seattle for execution by the Railroad Company. The Railroad Company refused to execute this agreement, making specific objection to the provision, in Clause 8 added by Mr. Jones, calling for a joint user bridge with the City of Hoquiam, and returned the draft to Mr. Bridges with instructions to see complainant and have that clause eliminated. Complainant refused to consent to its elimination, and as the Railroad Company refused to execute the agreement with that clause included, negotiations were brought to a standstill. When Mr. Bridges found that complainant would not consent to an elimination of the so-called bridge clause he arranged with Mr. Jones and Mr. Emerson that the negotiations between complainant and the Railway Company should be held in abeyance while the Railway Company took up the matter of the bridge at Simpson Avenue with the City of Hoquiam in an endeavor to work out with the city a plan that would be satisfactory to all parties. When these negotiations were taken up with Mr. Hoquiam a

citizens' committee appeared, with Mr. Emerson as its chairman, acting in conjunction with the city on these negotiations. Finally, during the summer of 1910 an agreement was reached between the Railroad Company and the city by which it was arranged that the Railroad Company would construct its own bridge, and the city, at such time as it might desire in the future, would construct a separate highway bridge adjoining the railway bridge and utilizing certain of the piers of the railroad bridge so far as practicable. This agreement was reduced to writing and signed by the Railroad Company and the city authorities on September 10, 1910. Immediately upon the consummation of this arrangement with the city, and on the same day, Mr. Holman, representing the Railroad Company, telephoned Mr. Jones that the Railroad Company had arranged the matter in dispute with the city and was now ready to consummate the agreement with complainant. Mr. Jones thereupon came to Seattle immediately and met Mr. Holman together with Mr. Bridges in the former's office in Seattle. There is some discrepancy in the testimony of Mr. Jones, on the one part, and Mr. Holman and Mr. Bridges, on the other, as to what transpired at this conference. They all agree, however, that Mr. Holman stated to Mr. Jones that the Railroad Company had adjusted the bridge

matter with the city, and as that was the only matter unsettled between the Railroad and the Lumber Company he was prepared to consummate the purchase of the right of way in accordance with the terms of the letter of June 9, 1909, and was ready to pay over the $134,000 in cash upon delivery of deeds by the Lumber Company; that Mr. Jones refused to accept $134,000, and stated that the Railroad could not acquire the property for less than $144,000, and that Mr. Holman thereupon stated that the Railroad Company would not pay any sum in excess of $134,000, the price agreed upon in the June agreement, and that if the Lumber Company insisted upon any sum in excess of that amount he would call the deal off; and that Mr. Jones declined to accept $134,000. No further negotiations were ever had between the parties after this meeting of September 10, 1910. The Railroad Company early in May, 1911, consummated an arrangement with the Northern Pacific Railroad Company for the use of its tracks and depot facilities into Hoquiam. Immediately upon public announcement of this arrangement being made complainant prepared deeds to the property covered by the letter of acceptance of June 9, 1909, expressing a consideration of $134,000, and made tender thereof to the Railroad Company, and demanded payment of the purchase

price. The Railroad Company rejected the tender and this action was soon thereafter commenced.

## ARGUMENT.

The very clear, full and convincing discussion of the testimony and of the legal principles involved, in the opinion of the District Judge, found in the transcript and commencing on page 60, makes it unnecessary for us to enter into as elaborate a discussion as might otherwise be desirable. The conclusions of fact reached by the District Judge should be accepted by this court as conclusive, not only because of the weight usually given to findings of the lower court in equity cases, but for the further reason that the District Judge had the benefit of the complete testimony of all of the witnesses, whereas this court has only an abstract thereof.

### I.

This being a bill for specific performance of a contract to sell real estate, and there being no allegation nor proof of part performance to take the case out of the statute of frauds, the contract to be enforced must be in writing. *Swash vs. Sharpstein,* 14 Wash. 426.

The first question in the case, therefore, is, Was there a complete written contract between the

parties? Both Judge Rudkin, in his memorandum opinion on demurrer to the complaint, and Judge Cushman in his opinion on the merits, held that the letter of Baldwin of June 9, 1909, with the written acceptance of the complainant of the same date, in connection with the allegations of the bill, standing alone, would *prima facie* constitute a valid written agreement between the parties. We do not question the correctness of this proposition. The letter of June 9th, however, provides that "a formal agreement shall be entered into pending actual transfers." The evidence shows that soon after the execution of the tentative agreement of June 9th, Mr. Bridges, the attorney for the Railroad Company, and Mr. Emerson, the vice-president and general manager of complainant, met together for the express purpose of carrying out that clause in the letter, and drafted a formal agreement, embodying all of the terms contained in the Baldwin letter, somewhat elaborated, and with many minor details agreed upon by the parties, and this formal draft was left with the complainant for execution. The complainant refused to execute it, but instead drafted a new agreement, changing the terms of the payment to the disadvantage of the Railroad Company, and adding an entirely new clause, numbered paragraph 8th, containing what is referred to in the

evidence as the bridge clause. There is admittedly nothing in the Baldwin letter of June 9th that warrants the complainant in seeking to bind the Railroad Company to either a cash part payment on the execution of the formal agreement, or to impose an obligation to construct a joint user bridge in connection with the city. The Railroad Company refused to consent to this clause, and the complainant refused to execute any formal agreement that did not contain this clause. In other words, the complainant persistently and continuously refused to execute a "formal agreement," as stipulated in the Baldwin letter, obligating it to convey these lands, unless the Railroad Company would bind itself by written agreement to the terms of the bridge clause, and the Railroad Company persistently refused to so obligate itself. It is unquestionable that the memorandum agreement or letter of June 9th contemplated that a more formal agreement should be entered into between the parties. That was one of the stipulations of the agreement. Doubtless there were many minor details which had not been fully worked out between the parties at the time of the tentative agreement of June 9th, and which both parties considered to be of such importance that they should be finally settled and agreed upon before complainant should be conclusively obligated

to sell, or defendant to purchase the property in question. Evidently, the complainant did not consider itself obligated by the Baldwin memorandum to sell this property on the terms expressed in that memorandum, because immediately afterwards it refused to carry out the first stipulation in that memorandum, to-wit, the execution of the formal agreement, unless the formal agreement changed the terms of payment and included the so-called bridge clause, which is clearly an addition to the terms as expressed in the Baldwin memorandum. The record brings this case squarely within the decision in *Hite & Raffeto vs. Savannah Electric Co.,* 164 Fed. 944. This case is referred to and quoted in the opinion of Judge Cushman in the record, and we think is squarely on all fours with the case at bar.

The complainant, as we now understand its position, is seeking to enforce the alleged contract of June 9, 1909, known as the Baldwin letter. It is admitted in its brief, and is abundantly shown by the evidence, that the complainant at all times refused to recognize this memorandum as embodying all of the essential terms of the understanding between them, and insisted upon imposing covenants and obligations upon the Railroad Company additional to those contained in that memorandum. That

the Baldwin memorandum was not considered by complainant a complete contract in itself is shown, not only by the clause therein that a formal contract should be entered into, pending actual transfers, and by the fact that complainant put forth new conditions and demands favorable to itself as part of the agreement—notably the $20,000 cash payment and the onerous bridge clause—but by the further fact that Mr. Emerson testified that he expressly notified Mr. Bridges that complainant "held in abeyance" the obligation of the June agreement to cooperate in getting franchises until the signing of the formal agreement. He was asked this question:

> "Q. A memorandum signed June 9, 1909, contains this clause: 'However, we shall expect and you shall give us your cooperation in procuring other properties in Hoquiam and also franchises in Hoquiam.' Had you had any request in pursuance to that request from the officers of the Railroad?
>
> A. No. In conversation with Mr. Bridges we told him we held those things in abeyance until the signing of his contract.
>
> Q. What things were held in abeyance?
>
> A. The procuring of rights of way and franchises.
>
> Q. Until the signing of what contract?
>
> A. The contract for right of way through the Northwestern Lumber Company's property."
>
> (Transcript, p. 88.)

This testimony shows that complainant did not consider itself bound by any of the provisions of the Baldwin memorandum of June 9th until the terms of the contemplated formal agreement should be settled and executed. The conclusion of the trial court that the minds of the parties never met upon all of the points under negotiation, and that no agreement was finally reached, is abundantly sustained by the record.

II.

It is argued by complainant's solicitors that although the so-called bridge clause was not included in the contract or memorandum of June 9th, 1909, it was a part of a preceding verbal understanding between the complainant and Mr. Balwin, and that it was therefore proper for the complainant to insist upon its insertion in the formal agreement as a part of the contract between them. As we have stated before, this being a bill to enforce a specific performance of a contract to convey real estate, the contract must be in writing. This means that the entire contract must be in writing. The writing must contain all of the essential terms and conditions between the parties. If, as complainant now insists, the bridge clause was part of the original oral agreement or understanding between the parties, and one of its conditions, and therefore the

complainant was justified in refusing to execute a formal agreement which did not embody that stipulation and condition, it necessarily follows that the entire agreement between the parties was not in writing, and therefore cannot be specifically enforced in equity. The court cannot enforce performance of a written agreement modified or enlarged by prior verbal agreements, because to do so would violate the statute of frauds. No agreement to sell or purchase real estate can be enforced (in the absence of part performance, which is not claimed in this case) unless the agreement is in writing.

*Swash vs. Sharpstein,* 14 Wash. 426, 435.

*Brown on Statute of Frauds,* 376 *et seq.*

*Reid vs. Diamond Plate Glass Co.,* 85 Fed. 193.

*Williams vs. Morris,* 95 U. S. 444.

*3 Jones on Evidence,* Sec. 429.

If the memorandum of June 9th was a completed contract, and not merely one step in the negotiations then pending and which subsequently failed of consummation, it seems quite clear to us that that contract cannot be varied, altered or added to by proof of previous verbal negotiations or previous oral agreements. The general rule on this subject is, of course, not disputed. Parol testimony is

admissible to show the situation of the parties and of the subject matter so as to enable the court intelligently to construe the contract, as expressed in the writing, in accordance with the intention of the parties.

*DeWitt vs. Berry,* 134 U. S. 306;
*The Cayuga,* 50 Fed. 483;
*Reid vs. Diamond, etc., Co.,* 85 Fed. 196;
*Bank vs. Ins. Co.,* 71 Fed. 476.

It is argued by appellant, however, that inasmuch as the memorandum agreement of June 9th obligated the appellant to co-operate with the Railroad Company in procuring its franchises in the City of Hoquiam, this bridge clause was intended to qualify or explain that obligation, and in that connection it is earnestly argued in appellant's brief that the obligation of complainant to assist the Railroad Company in procuring franchises as expressed in the June 9th memorandum was broadened and enlarged by the language used by Bridges and Emerson in their draft of the formal agreement, and that the bridge clause was added by Jones for the purpose of restricting this obligation of the complainant to the particular subject matter in mind at the time the June 9th agreement was executed. The court below held against both of these contentions. The obligation, as expressed in the memorandum, reads

as follows:

> "However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam."

The corresponding clause, as drafted in the formal agreement by Bridges and Emerson, provided that complainant "will co-operate with the said second party in procuring such franchises in the City of Hoquiam as it may desire and in securing such additional rights of way in the City of Hoquiam as the second party may desire." It seems to us that it is futile to contend that this latter phraseology broadens the obligation of the complainant as expressed in the June 9th memorandum. Appellant's contention, as we understand it, is that the phraseology used by Bridges and Emerson in the formal draft obligated the complainant to co-operate with the Railroad Company in procuring such franchises as the Railroad Company *might desire,* whereas the language used in the June 9th memorandum only obligated complainant to co-operate in procuring some franchises, but not all franchises it might desire. It is certainly obvious that the Railroad Company would not stipulate for the assistance of complainant in procuring franchises which the Railroad Company did not desire. A fair reading of the clause indicates that inasmuch

as complainant and its officers were influential in the community of Hoquiam and with the city council the Railroad Company stipulated for their active assistance in procuring such properties and such franchises as the Railroad Company might need or desire. If a franchise from the city was necessary to authorize the railroad to construct a bridge at the point contemplated, then the clause in the June 9th memorandum obligated the complainant to cooperate in securing it, and parol evidence tending to exclude that particular franchise from the agreement was inadmissible.

The record further shows, however, that the insertion of the bridge clause by complainant in the formal draft of the proposed agreement had no relation whatever to the franchise clause as drafted by Bridges and Emerson. If it had been intended to qualify the Bridges draft, which is clause 7 of the formal draft, the qualification would have been expressed in that connection and as a part of that clause. Instead of so expressing it, clause 8, as an independent clause, was added. The reading of this entire clause shows that it relates to the manner of construction of the railroad bridge across the Hoquiam River, and its arrangement in such manner as to be most advantageous to the complainant's property. The purpose which Mr. Jones

and Mr. Emerson had in mind in inserting this bridge clause in the draft and in insisting upon it afterwards is quite obvious. The record shows that the city at that time was not in a financial condition to build a separate highway bridge at that point, or at least that its responsible officers believed that its financial condition would not justify such an expenditure. (Transcript, pp. 151-2, 121.) A highway bridge at that point would have been of great advantage to complainant by deflecting the entire city travel across the bridge in front of complainant's store and through its property. It is evident that complainant sought by inserting this clause in the agreement to offer an inducement to the city authorities to join in constructing a highway at this point at once and to coerce the Railroad Company into assisting the city in constructing such a highway, to the great benefit of complainant's property. This bridge clause first appears in these negotiations in a letter from Mr. Emerson to Mr. Bridges under date of June 30, 1909, found on page 144 of the transcript. This was after the Bridges and Emerson draft of the formal agreement had been transcribed and had been sent to Mr. Jones at Tacoma for his consideration. In this connection, Mr. Emerson states that they had added the bridge clause, and gives various reasons therefor. The

letter contains no reference whatever to the obligation to assist the Railroad Company in procuring franchises, and shows conclusively that the bridge clause did not originate in any thought that the franchise obligation had been expressed too broadly in Bridges' draft. In the letter it is stated that complainant was anxious to build its mercantile establishment on the southwest corner of block 51, one of the considerations being this joint user bridge at Simpson Avenue, and the fact that their warehouses and wharves would otherwise have to be abandoned.

The theory advanced by appellant's solicitors in their brief that this bridge clause was not an independent covenant or burden which it had sought to fasten upon the Railroad Company, but a mere qualification of its obligation to assist the Railroad Company in procuring franchises has, therefore, no basis of fact upon which to rest. The right of the Railroad Company to construct the bridge across the river was secured by permit from the War Department. The ordinance introduced by Mr. Bridges on behalf of the Railroad Company on or about July 27, 1909, did not touch in any wise upon the character of the bridge to be constructed by the Railroad Company across the river. The character of that bridge was not a matter to be controlled or

governed by franchise from the City of Hoquiam. That there had been some talk between the city officials and the Railroad Company's officials relative to the construction of a bridge is fairly indicated in the record. At one time it was contemplated between them that the railroad bridge would have a footpath for the accommodation of foot passengers, and there was some discussion as to the feasibility of a double deck bridge. Transcript, pp. 151-2.) These were matters, however, that were under negotiation between the city and the Railroad Company as a matter of contract and not of franchise. It is also to be noted that the record discloses that complainant's officers at all times during these negotiations took the side of the city as against the Railroad Company, and their opposition to the plans of the Railroad Company was so marked that they were charged in open meeting by the railroad officials with being actuated by a selfish desire to benefit complainant's property rather than the city.

The court below found as a fact that there never was any definite understanding or agreement between the complainant and anyone representing the Railroad Company that the Railroad would accept a common user bridge with the city. It is true, Mr. Jones testifies that there was such an understanding with Mr. Baldwin, and Mr. Emerson to some

extent corroborates Mr. Jones in this statement. It is very probable that in the long negotiations pending between Baldwin and the complainant the plans of the Railroad Company for entering Hoquiam and the various plans for the development of its depot grounds and other property were from time to time discussed, and that the feasibility or possibility of a joint bridge to be constructed by the Railroad and the city may have been discussed between them. The record shows, however, that this was not a part of the matter to be contracted about between complainant and the Railroad Company, and that the Railroad Company never at any time consented or agreed that its agreement or contract with complainant should contain any restrictions whatever with respect to the character of the bridge it would construct across the river. The testimony of Mr. Jones seems to show that the matter of the bridge was discussed with Mr. Baldwin only in a general way, and was not considered as a condition of the contract between these parties. (Transcript, p. 102.) The Railroad Company as early as the summer of 1908 had been considering various lines of right of way to give it access to Hoquiam, and these various plans had been discussed with Mr. Jones and Mr. Emerson from time to time. In September, 1908, as a result of these discussions and negotia-

tions Mr. Emerson submitted to the Railroad Company a detailed written proposition covering four alternative lines of right of way across complainant's property into Hoquiam, stating prices and other details with respect to each route. Each of these alternative lines contemplated a bridge across the river at Simpson Avenue. This writing contains no suggestion whatever of any restrictions upon the Railroad Company in the construction of its bridge. These various negotiations culminated in the meeting of June 9, 1909, at which were present Mr. Baldwin, Mr. Bridges, Mr. Jones and Mr. Emerson, and the letter of acceptance of that date was then prepared and executed by both parties as expressing the points upon which they had agreed. That writing contains no bridge clause, nor any suggestion of any restriction upon the Railroad with respect to the character of its bridge. None of the witnesses claim that any such clause was even the subject of discussion at that time. Some days later Mr. Bridges and Mr. Emerson, representing both parties, met in Mr. Emerson's office, with the express purpose of expressing in a formal written agreement all matters of contract between the parties, and a draft was dictated by them for that purpose. There was nothing in that draft relating to the character of bridge to be constructed by the

Railroad Company. Mr. Bridges testified that up to that time he had never heard any suggestion of a restriction upon the Railroad to a joint user bridge with the city, although he attended most if not all of the conferences between Baldwin, Emerson and Jones. The record shows that there was considerable correspondence between the parties prior to that date, in none of which is there any suggestion that the Railroad Company was to be burdened, by this contract with complainant, by an obligation to construct a joint user bridge with the city. This bridge clause first appears in the negotiations, so far as any writing is concerned, in this letter from Mr. Emerson to Mr. Bridges of June 30 (p. 144 of the transcript), after the death of Mr. Baldwin, and Mr. Bridges testified that he never heard such a clause even suggested prior to the receipt of that letter. Mr. Baldwin, with whom Mr. Jones and Mr. Emerson claim to have had the understanding or discussion relative to a joint user bridge, died on June 16, 1909, so that his testimony has not been available. We think this record abundantly proves the fact that while it was known that the Railroad Company contemplated crossing the river at Simpson Avenue and that the city contemplated, at some time, the construction of a highway bridge at the same crossing, it was never intended by either of

these parties that the contract between them was to impose a condition upon the Railroad that it should construct a joint user bridge with the city. Such a clause was objectionable to the Railroad Company for obvious reasons, which are pointed out by the witness Holman in his testimony, and we think the court below was abundantly warranted by the evidence in finding that no such agreement was ever entered into, either verbally or otherwise, between the parties.

It is contended in appellant's brief that the bridge clause was not intended as a burden upon the Railroad Company or as imposing upon it an obligation to construct a joint user bridge, if the city desired such a bridge, but merely expressed the consent of the complainant to a joint user bridge in the event the Railroad Company and the city desired to join in its construction. Mr. Jones gives some little color to that theory in his testimony (pp. 104, 105 of the record).

We respectfully submit that the entire record, as well as the clause itself, contradicts that theory. As stated before, the letter of Mr. Emerson explaining why that clause was inserted in the draft is not consistent with the theory that it was merely intended to express complainant's assent to such an

arrangement, if desired by the Railroad and the city. In the second place, the consent of the complainant to such an arrangement was not necessary. When Simpson Avenue was extended by the city the complainant would have no control over either the city or the Railroad Company in the type of bridge to be constructed over the river on the street crossing. The conduct of the officers of complainant in insisting upon this clause in the agreement, and its persistent refusal to eliminate it when requested by the defendant, also contradicts this theory. Mr. Emerson states that while he was chairman of the citizen's committee in August, 1909, Mr. Jones was insisting upon the bridge clause in the agreement, and the committee was trying to bring harmony between the two different parties, evidently meaning between Jones, representing complainant, and the defendant Railroad Company (Transcript, p. 96).

We do not deem it necessary to notice in detail the authorities cited by complainant in its brief as warranting the attempt to inject this so-called bridge clause into the agreement or contract between the parties. They are seeking here specific performance of some contract involving a conveyance of real estate. In their complaint and in the brief, as we understand them, they insist that the memorandum of June 9th, 1909, constitutes such a con-

tract. It is perfectly manifest that an obligation or stipulation binding the Railroad Company to assent to a joint user bridge with the city does not rest upon the construction of any language in the June memorandum, but it is a plain addition thereto; and it is equally plain that it is a condition added by the complainant for its own benefit, and one upon which it insisted at all times until the negotiations were broken off. Complainant could just as consistently have refused to carry out the arrangement evidenced by the Baldwin memorandum by insisting upon any other conditions relating to the character of station buildings to be constructed, or the arrangement of tracks upon the right of way to be conveyed, or the character of service to be furnished to the complainant's industries.

III.

After the complainant injected the bridge clause into the negotiations, and the parties found that they were unable to reach an agreement on that account, the Railroad Company endeavored by negotiations to reach an agreement with the city which would obviate this obstacle to a completion of the negotiations with the complainant. It is stated by both Mr. Bridges and Mr. Emerson that this course was pursued by the Railroad's representatives with

the acquiescence and approval of the complainant and with the understanding that the negotiations with the complainant would stand in abeyance until the Railroad Company could determine whether it was possible to reach an agreement with the city relative to the bridge. There is some contention made in appellant's brief that this was a waiver by the Railroad Company of its objections to the bridge clause. This contention is clearly untenable. The evidence shows that neither party yielded its position with respect to the bridge clause, nor intended to waive its contention. The Railroad Company, however, was desirous of acquiring this property from complainant at the price which had been agreed upon, and in good faith endeavored to reach an understanding with the city which would induce the complainant to waive this objectionable clause upon which it was insisting and enable the parties to consummate their negotiations. This was fully understood by complainant and acquiesced in by it. When these negotiations were taken up by the city with the Railroad Company a citizens' committee immediately appeared on the scene, headed by Mr. Emerson, and this committee at all times during those negotiations took the side of the city as against the Railroad Company, both as to the character of the bridge to be constructed and in the distribution

of cost as between the city and the Railroad Company, in the event a joint bridge was constructed. Ultimately the Railroad Company succeeded in working out a plan with the city officials, by which it was agreed that the Railroad Company should construct its own bridge at the Simpson Avenue crossing, leaving the city free to construct a highway bridge alongside the railway bridge whenever it desired to do so, using certain of the center piers of the Railroad bridge. This bridge clause having been the only condition in the negotiations upon which the parties had been unable to agree, and that clause becoming immaterial when this agreement was reached with the city, the defendant immediately notified Mr. Jones that it was ready to close the negotiations and consummate the purchase. Pursuant to this notice Mr. Jones met Mr. Holman and Mr. Bridges in Seattle. These witnesses do not entirely agree as to what took place at this meeting, but their differences are in the main on immaterial details. That Mr. Holman offered to close the trade by paying over to the Lumber Company the sum of $134,000 in cash, the purchase price of the property, and accept deeds from the Company to the property, in strict conformity to the Baldwin memorandum, and that Mr. Jones refused to accept this offer and demanded $144,000, are facts testified to by all

three parties. Mr. Jones says that he considered the additional $10,000 as interest. Mr. Bridges says that Jones demanded a flat sum of $144,000, although he may have used the word interest or delay in consummating the deal as his excuse for making the additional claim. Mr. Holman's recollection is that Mr. Jones demanded an additional sum of $10,000 on account of the delay in consummating the negotiations. Mr. Jones made no objection to the proposal to consummate the negotiations at once except to the price. He demanded $144,000 instead of $134,000. In Mr. Jones' first testimony relative to this conference (appearing on pp. 107, 108 of the transcript) he claims that he did not mention any amount but thought they ought to have interest, and that when Mr. Holman asked how much interest, what it was on, he did not fix any amount. He states further that Holman "said he could not do anything in regard to the interest—and would have to drop the matter." Mr. Bridges' statement of what transpired at the meeting appears in the transcript (p. 153). He states that Holman offered to immediately consummate the trade by paying $134,000 cash on execution of the deed, and Jones demanded $144,000. The interview concluded as follows:

> "Mr. Holman then said, 'Now, Mr. Jones, we are ready to take up this deed for $134,000

> and pay you for it but we will not pay you any more.' Mr. Jones says, 'You cannot have it for less than $144,000,' and walked out of the office. That was the end of it. Mr. Jones demanded there at the conversation the payment of $10,000 extra or $144,000, before the transfer would be made, and Mr. Holman expressly refused to pay it."

Mr. Holman's version of this interview (Transcript, pp. 173, 174) is that after explaining that the matter of the bridge had been adjusted with the city he told Jones that he was ready to close the matter by paying over $134,000 in exchange for the deed, and that Jones demanded $144,000, giving as his reason that the trade had been closed over a year previously and it was in the nature of interest; that Bridges explained to Jones that complainant had been in possession of the property all the time and that the negotiations had been held in abeyance pending the adjustment with the city, and that Jones replied, "That Makes no diffirence, that property will now cost you $144,000." I said, "Mr. Jones, we will never consider that for a minute, we will not pay that price." Mr. Jones said, "You will either pay that price or not get the property." I said, "Well, we will not take the property at that price, I will not agree to it." Mr. Jones remarked, "Well, either you or somebody else will pay that price before you get the property," and immediately left

the room. There were never any negotiations between the parties from that date, September 10, 1910. The Railroad Company never made any further effort to acquire the property from the complainant and the complainant never made any further inquiries in regard to it. Mr. Holman immediately began working out a right of way different from that included in the negotiations with complainant, with a view to locating the depot on different property and acquiring such of complainant's property as might be necessary by condemnation. In May following, however, the defendant company made a contract with the Northern Pacific for the use of its tracks into Hoquiam and for the use of its station facilities. Immediately upon this fact becoming known complainant tendered its deeds, expressing a consideration of $134,000, and demanded specific performance of the Baldwin memorandum of June 9, 1909.

It is admitted by all of the parties that Mr. Holman, on behalf of the Railroad Company, in this interview offered to immediately carry out the contract of purchase with complainant at the price agreed upon in the Baldwin memorandum, and that complainant refused to perform the contract unless an addition of $10,000 was made to the purchase price. It is contended by complainant that it did

not understand the negotiations ended with this interview. It is admitted, however, by Mr. Jones that Mr. Holman stated to him distinctly that the Railroad Company would not pay anything in excess of $134,000, and would have to drop the matter. This statement is emphasized by the testimony of both Holman and Bridges. We think the testimony of the witnesses shows conclusively that both sides understood at that time that the negotiations had failed, and this is strongly corroborated by the acts of both parties. It will be noted that Mr. Jones claims that he did not make a direct demand for either $10,000 or interest, but merely stated that he thought they ought to have interest because of the delay in consummating the negotiations. He further admits that Mr. Holman positively refused to pay interest and said he would have to drop the matter. In view of the position which Mr. Jones claims to have taken in that interview, that is, that his company was entitled to have interest because of the long delay, and the position which he says Mr. Holman took, to-wit, that he would not pay interest but declared the deal off, it is inconceivable that complainant would have suddenly ceased all conferences or negotiations and would have made no further request or demand or inquiry of the Railroad Company from the time of that meeting,

September 10, 1910, until June of the following year after the Railroad had acquired an independent entry into Hoquiam, if the complainant, as it now claims, considered that there was an existing contract with the Railroad under which payment of the purchase price was long past due. If they were claiming interest in September, 1910, because of the delay in closing the deal, is it not unreasonable to assume that they would remain quiescent for nine months longer in the face of the knowledge that the Railroad Company was refusing to pay any interest, and make no endeavor whatever to have the matter closed? To us it is apparent that complainant believed the Railroad Company could not acquire an entry into Hoquiam without crossing its property and would ultimately be compelled to accede to its demand. This belief of complainant was based upon the known fact that the Railroad Company had a permit from the War Department for the construction of its bridge at Simpson Avenue and that the agreement of the Railroad Company with the city also located the bridge at the same point. It was impossible to construct a line to cross a bridge at Simpson Avenue without crossing the property of complainant. The line would not necessarily be the same line contemplated in the previous negotiations, but that was a matter

presumably immaterial to complainant. Feeling that the Railroad Company would be compelled, either by negotiations or condemnation, to acquire a right of way and station grounds from them, they felt perfectly safe in allowing the previous negotiations to fail, as they were confident they would ultimately get a larger sum out of the defendant. In fact, Emerson had previously stated to Bridges that his associates, presumably referring to Jones, were not satisfied with the price and that if he (Bridges) approached them with an endeavor to get the price changed the probability was that the price would be increased. It is evident from the entire record that the complainant thought that it had entire command of the situation, and that defendant would be compelled to ultimately yield to whatever demands it might put forward. The officials of the Lumber Company, as appears from the evidence in the case, were wealthy and influential men in Hoquiam, and they felt reasonably safe in assuming that any jury in condemnation proceedings would not do them any injustice in the amount of its award. Common experience justified them in that assumption.

In weighing the testimony of the witnesses as to what took place at this conference in September, 1910, as well as the testimony regarding the understanding with Baldwin as to the bridge clause, it is

proper that we should call the attention of the court to the somewhat frail memory of Mr. Jones and Mr. Emerson as to further facts which developed in the case. Both Emerson (Transcript, pp. 86 and 94) and Jones (Transcript, p. 113) state positively and repeatedly that they never knew why the Railroad Company refused to sign the formal agreement containing the bridge clause, and that they were never informed that defendant objected to that clause. On cross-examination Mr. Emerson finally admitted (Transcript, pp. 95-6) that he was in error in that statement, and that he did know that the Railroad Company had refused to sign because of the bridge clause. Mr. Jones on cross-examination made substantially the same admission (Transcript, pp. 115-6). It developed subsequently, on taking the testimony of Mr. Bridges, that he had notified the complainant in writing on July 23, 1909, that the Railroad Company refused to execute the draft of the formal agreement because it contained the so-called bridge clause. That letter is found on page 147 of the transcript. It will be noted that in this letter Mr. Bridges refers to a talk had by him with Mr. Jones on the preceding Tuesday, in which he notified Mr. Jones that the defendant would not sign the contract with the so-called bridge clause. A careful reading of the testimony of both Jones

and Emerson under cross-examination on this particular point discloses either a manifest attempt at evasion or a very deceptive memory, which should put the court upon its guard in accepting other statements made by them regarding other facts. They both testified that the bridge clause was written into the formal agreement by Mr. Bridges, and Mr. Jones stated that it was written in by Bridges in his presence by simply adding clause 8th to the draft previously made by Bridges and Emerson, without re-writing any of the document except possibly the last page (Transcript, pp. 113-4). Mr. Bridges denied this entire statement (Transcript, pp. 144 *et seq.*) He is fully corroborated and sustained by the letter from Mr. Emerson under date of June 30, 1909, wherein he stated that the bridge clause was added by him (Transcript, p. 144). The draft containing the bridge clause also differs in other respects from the draft dictated by Bridges and Emerson, notably in the fact that Jones had added a provision for a cash payment of $20,000 on signing the agreement, which provision was not in the draft drawn by Bridges and Emerson. These discrepancies are not material in themselves, but show that the memory of Mr. Jones is not entirely reliable.

This action is to enforce specific performance of the memorandum of June 9, 1909. That memo-

randum contained three separate clauses: (a) that complainant would convey the property therein described for a consideration of $134,000, (b) that a formal agreement should be entered into between the parties embodying the terms of the contract prior to transfer, and (c) that complainant would co-operate with the defendant in securing other properties and franchises in Hoquiam. The record clearly shows that complainant refused to execute the formal contract embodying the terms of the Baldwin memorandum, unless they could add thereto the bridge clause and change the terms of payment to their advantage. The record further shows that complainant has refused to co-operate with the defendant in securing franchises in Hoquiam, claiming that that obligation never became effective because no formal agreement had ever been executed. The record further shows that complainant refused to perform the agreement to convey the property to the defendant for a consideration of $134,000, and refused to convey at all unless it was paid an additional sum of $10,000. In other words, the record clearly shows that the complainant has heretofore refused to perform each of the three obligations assumed in the Baldwin memorandum. We do not understand that appellant's solicitors really insist that complainant was entitled to demand an addi-

tional $10,000 either by way of interest or otherwise, but their contention rather is that complainant made the demand in good faith and therefore should not be deprived of its remedy of specific performance if it was mistaken in its demand. That complainant was not entitled to the additional sum demanded, either by way of interest or otherwise, is perfectly clear from the terms of the agreement. In the Baldwin memorandum the clause with respect to payment is as follows:

> "You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty days after delivery of abstracts within which to examine the same, and upon our attorneys passing title and delivery by you to us of proper deeds of warranty to such property we will pay you the aforesaid sum."

The price named, to-wit, $134,000, was not payable until the complainant delivered to the Railroad Company proper deeds of warranty to the property. It is admitted that no such deeds were tendered prior to June, 1911. Interest could not be demanded until the Railroad Company was in default in payment, and admittedly it was not in default in September, 1910, when the $10,000 extra was demanded, because deeds had not been delivered or tendered prior to that date. The record therefore shows that the defendant at that time offered to carry out and

consummate the trade between them and that complainant refused performance. At that time the Railroad Company had completed its negotiations with the city of Hoquiam, and was ready to construct its line into that city, having practically completed the road to Aberdeen. When the complainant refused its offer of $134,000, and demanded an additional $10,000, the defendant was confronted with one of three alternatives—either, first, to submit to the exaction of $10,000 additional; or, second, delay construction of its line into Hoquiam until it could bring suit against complainant and enforce the performance of its contract (assuming there was a valid contract existing), which would have entailed a delay of ten months or more in completing the line to Hoquiam; or, third, abandon the negotiations with complainant and obtain entry into Hoquiam in some other way or over some other line. It chose the latter alternative. After the Railroad Company has elected to abandon the negotiations, because of the refusal of complainant to consummate them, and has changed its condition and acquired an independent entry into Hoquiam, so that it cannot now use the property of the complainant, the complainant cannot be permitted in a court of equity to retrace its steps and, under these changed conditions, elect to do what it refused to do in September, 1910.

The party seeking the remedy of specific performance of a contract in equity must show himself to have been at all times ready, desirous, prompt and eager to perform upon his own part. *3 Pomeroy, Equity Jurisprudence,* section 1408. This equitable remedy will not be given where the party seeking it has been guilty of any laches, and the position of the defendant, as a consequence thereof, has so changed that the remedy against him would be harsh or oppressive.

In *Hogan vs. Kyle,* 7 Wash., 600, it is said:

> "The doctrine of the court thus established is that laches on the part of the plaintiff (whether vendor or purchaser) either in executing his part of the contract or in applying to the court will debar him from relief. A party cannot call upon a court of equity for specific performance, said Lord Alvanley, M. R., unless he has shown himself ready, desirous, prompt and eager, or, to use the language of Lord Chanworth, specific performance is relief which this court will not give unless in cases where the parties seeking it come promptly as soon as the nature of the case will permit."

It is also well settled that where a vendor once refuses to convey upon demand he cannot subsequently enforce specific performance by the vendee.

*Johnson vs. Lara,* 50 Wash. 368.
*Eveleth vs. Scribner,* 12 Maine, 24.
*S. C.,* 28 *Am. Decs.,* 147.
*Porter vs. Citizens Bank,* 73 Mo. Appeals, 513.

The complainant is here seeking to enforce specific performance of the alleged contract of June 9, 1909. Its officers admit that they refused to execute the formal agreement called for by that contract, unless there was inserted at least two additional conditions, to-wit, a covenant for the payment of $20,000 of the consideration upon the execution of the formal agreement, contrary to the express terms of the June 9th memorandum, and, second, the insertion of the so-called bridge clause, which is admittedly not in the previous memorandum, they refused to co-operate in procuring franchises from the city, claiming that that obligation was held in abeyance, pending the execution of the formal agreement; they refused to convey the property upon the payment of $134,000 in accordance with the June agreement. Complainant is now here in court asking the specific performance of the identical agreement which it in these three respects heretofore specifically refused to perform. Under the doctrine of the cases above cited, it is not entitled to any relief, even if it be assumed that a definite valid agreement was consummated between the parties.

The relief asked in this case at this time would not be equitable, but would be exceedingly harsh and oppressive upon the defendant. At the time of the negotiations the Railroad was seeking to acquire a

right of way and station grounds. Because of the conduct of the complainant, and its refusal to convey the property in accordance with the terms previously agreed upon, the Railroad was compelled to abandon the right of way contemplated, and has acquired entry into Hoquiam and station grounds from other parties. It could make no use whatever of the property of complainant at this time. Even if the utmost good faith could be conceded to the complainant in the demand made by it for the additional $10,000, the fact would remain that it was not entitled to exact that sum from complainant and that its unjust demand, coupled with its failure to assert any intention to attempt to hold the complainant to the purchase of this property, resulted in forcing the defendant into making other arrangements for its road. The price named in the original memorandum, $134,000, covered not only the value of the property which was to be conveyed but the damage to the remainder of complainant's property. Mr. Emerson specifically states that this sum included, first, the value of the property sold; second, benefits the complainant anticipated from the construction of the road, and, third, damages to complainant's other property from the operation of the road along this right of way. (Transcript, p. 89.) Two of these elements are eliminated by the fact

that the road has been constructed elsewhere. It would be manifestly inequitable to compel the defendant to pay the complainant $134,000 as the purchase price of this property, when complainant's officers state that that sum was not the purchase price, but included the estimate of damages to the remaining property that would result from the operation of a railroad over this right of way.

IV.

It is suggested rather than argued in the brief that if the court finds that the remedy of specific performance should not be given, then the complainant should be allowed damages. It is, of course, well understood that a court of equity is not ordinarily the forum for the recovery of damages. It has jurisdiction to award damages in cases of specific performance only where the vendor has partially disabled himself to perform and the vendee elects to accept partial performance with an award of damages in lieu of full performance. If when the action was commenced the condition was such that complainant was not entitled to specific performance damages cannot be awarded as compensation.

*Peters vs. Van Horn,* 37 Wash. 550;

*Morgan vs. Bell,* 3 Wash. 554;

*McKinney vs. Big H. & C. Co.*, 167 Fed., 770; *3 Pomeroy Eq. Jur.*, sec. 1410.

Nor is it alleged in the bill of complaint, or claimed in the brief, that there is any part performance sufficient to take the case out of the statute of frauds. The complainant has remained in possession of the property, and no payment has been made by defendant. It is true, the complainant has made certain improvements on its property, and certain rearrangements of its business, which it claims it would not have made except for its expectation that defendant would construct its railroad upon the line contemplated. These expenditures by complainant were not made in performance of the contract. Under the terms of the Baldwin memorandum, the complainant agreed to remove the structures on the right of way within six months after passing the deed. The deed was never passed, and there is no evidence that any of the structures on the property included in the contemplated right of way have been removed. Even the expenditures by complainant in rearranging its business were all made subsequently to September, 1910, as shown by the testimony of both Jones and Emerson, and in any event they are not of such character as to con-

stitute performance of the contract, because they are not in any sense within the terms of the contract.

Respectfully submitted,

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